

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
May 24, 2006 Session

**SHARON FAYE BROWN HARTMAN v. LEONARD LEE HARTMAN**

**Appeal from the Chancery Court for Greene County**  
**No. 98000350     Thomas R. Frierson, II, Chancellor**

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**No. E2005-00010-COA-R3-CV - FILED JULY 31, 2006**

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This is a post-divorce case. Following the trial court's entry of the judgment of divorce, Leonard Lee Hartman ("Husband") filed a Tenn. R. Civ. P. 60.02 motion for relief, asserting error with respect to the trial court's treatment of a debt owed by the parties. Husband later filed a motion to modify his spousal support obligation to his former wife, Sharon Faye Brown Hartman ("Wife"). The trial court denied Husband's Rule 60.02 motion, finding that the motion was untimely because it was filed more than one year after the entry of the judgment of divorce. The trial court also found that, with respect to Husband's motion to modify his alimony obligation, the financial status of the parties constituted a material change in circumstances warranting a reduction in, but not the complete elimination of, Husband's alimony obligation. Husband appeals these findings, arguing (1) that the evidence preponderates against the trial court's refusal to completely eliminate his spousal support obligation; and (2) that the trial court abused its discretion when it denied his Rule 60.02 motion in view of the fact that, according to Husband, (a) Wife misrepresented facts to the trial court and (b) there is ambiguity in the divorce judgment. Husband also takes issue with the trial court's denial of his request for attorney's fees and expenses incurred by him as a result of Wife's alleged discovery abuse. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court**  
**Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

David B. Hamilton, Knoxville, Tennessee, for the appellant, Leonard Lee Hartman.

Timothy R. Wilkerson, Kingsport, Tennessee, for the appellee, Sharon Faye Brown Hartman.

**OPINION**

## I.

The parties were married for 30 years. When they married, Wife was 15 years old and Husband was 23. Wife completed the eighth grade and later obtained a GED. She had been employed as a teaching assistant for the Greeneville City School System for more than 10 years. Prior to this employment, she stayed at home, raising the parties' three children and taking care of their marital residence and farm. Husband is a chiropractor, who began his practice in approximately 1968. During the course of their marriage, Wife occasionally assisted in the operation of Husband's clinic. At the time of the hearing below, the parties' children had all reached the age of majority.

On February 17, 2000, the trial court awarded Wife a divorce on the ground of inappropriate marital conduct. The trial court, in light of Wife's disparate earning capacity, awarded Wife alimony *in futuro* in the amount of \$800 per month for 20 years or until she remarried, whichever occurred first. Husband was awarded the parties' marital residence, including the adjacent farm and farm equipment, two pickup trucks, his chiropractic practice, an office building and associated ground, and business equipment and fixtures. The trial court ordered Husband to pay the parties' marital debt, which included a debt to his mother in the amount of \$127,000. Wife was awarded several tracts of real property that had been rented by the parties, an automobile, common stock, and furniture. To achieve an equitable division of the parties' marital property, the trial court found it appropriate to order Husband to pay Wife \$123,530. A lien securing this latter award was imposed upon the parties' marital residence, which, as previously noted, was awarded to Husband.

Husband timely filed a motion to alter or amend the trial court's order, or in the alternative, for a new trial. Husband's principal argument was that the alimony award was not warranted, and that, even if some alimony was warranted, the decreed amount was too much. The trial court denied Husband's motion for a new trial. Husband's motion to alter or amend was partially granted to the extent the court ordered that the lien securing Wife's award of \$123,530 would be transferred from the marital residence to Husband's office building. The trial court upheld the alimony award, and entered its order addressing all post-judgment issues on July 19, 2000. By opinion released on July 20, 2001, this Court rejected Husband's position with respect to the issue of alimony and affirmed the trial court's decision. See *Hartman v. Hartman*, No. E2000-1927-COA-R3-CV, 2001 WL 823188 (Tenn. Ct. App. E.S., filed July 20, 2001).

The latest chapter in this litigation started on February 13, 2002, when Husband filed his Tenn. R. Civ. P. 60.02 motion. The motion asserts that Husband had discovered evidence since the divorce trial, which evidence pertained to "false, perjurious, and illegal conduct on the part of [Wife]." He argued that Wife's conduct resulted in an "injustice to defendant's credibility and an inequitable distribution of marital property." Husband's allegations pertained to the issue of Wife's involvement in and with the \$127,000 debt owed to Husband's mother. The motion stated that Wife, at the time of the divorce hearing, had disputed the classification of the \$127,000 loan as marital debt by testifying that she had never received any money from the loan and had not been involved in the loan transaction in any way. Husband argued that the trial court, "apparently bas[ed] its holding on

the false testimony of [Wife],” and, as a consequence, treated the \$127,000 debt as a “separate” obligation to be repaid in full by Husband.

On July 12, 2002, Husband filed a motion to modify his spousal support obligation, alleging his decreased ability to pay and Wife’s reduced need.

In January, 2004, Husband filed a motion to compel discovery, requesting that the trial court direct Wife to answer certain interrogatories and produce certain documents. On March 18, 2004, Husband filed a renewed motion to compel, stating that “entire classes of documents are not available and specific items were removed from the produced documents.” Wife responded by asserting that all of the documents in her possession had been provided to Husband. The trial court found that Husband’s requested “discovery should be allowed, *but that [Husband] ha[d] a means to obtain discovery.*” (Emphasis added). Consequently, the trial court ordered Wife to provide Husband with the sources of the requested documents. Husband’s counsel was then directed to subpoena the documents from each source.

On September 28, 2004, the trial court held a hearing to address, *inter alia*,<sup>1</sup> Husband’s Rule 60.02 motion and Husband’s motion to modify his spousal support obligation to Wife. An order incorporating the trial court’s memorandum opinion was entered on November 30, 2004. The trial court denied Husband’s Rule 60.02 motion, stating that

[i]f a movant seeks relief from the Judgment pursuant to 60.02(2) based upon fraud, misrepresentation or other misconduct of an adverse party, the motion must be filed within one year after the Judgment or Order was entered. In the case at bar, movant’s Rule 60.02 motion was filed more than one year following the Final Judgment entered in the trial court.

At the trial court level, Husband argued, in the alternative, that his Rule 60.02 motion should be treated as an independent action alleging fraud. The trial court acknowledged that courts are empowered to entertain such independent actions to relieve a party from a judgment brought about by fraud upon the court; but the court went on to state that such situations are limited to those

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<sup>1</sup>In her response to Husband’s motion to modify and/or alter the spousal support award, Wife filed a counterclaim for contempt based upon Husband’s retention of rent paid to him by tenants of an apartment building that was awarded to Wife in the divorce. The September 28, 2004, hearing also addressed this contempt motion by Wife. She was ultimately awarded the rental income due her, minus deductions for certain expenses and fees. The trial court further found that it was proper to award Wife attorney’s fees incurred as a result of her pursuit of this income. No issue is made with respect to these holdings of the trial court.

situations involving “extrinsic fraud,” a type of fraud clearly not implicated by Husband’s allegations.<sup>2</sup>

The trial court granted in part Husband’s motion to modify spousal support, finding that material changes in the parties’ financial circumstances had occurred that were “substantial as they ha[d] made significant impacts upon both the recipient’s need for spousal support and the obligor’s ability to pay.” Most notably, the trial court found that, following the divorce, Husband had experienced a significant reduction in his professional income. Accordingly, the trial court reduced Husband’s support obligation from \$800 per month to \$500.

On December 28, 2004, Husband filed a motion for a new trial and/or to alter or amend the November 30, 2004, judgment. In this motion, Husband argued that his spousal support obligation should have been totally eliminated, not merely reduced by \$300 per month. The motion also requested that the trial court make additional findings of fact pursuant to Tenn. R. Civ. P. 59. On the same day, *i.e.*, December 28, 2004, Husband filed a notice of appeal with respect to the November 30, 2004, judgment.

Some six months plus later, on June 10, 2005, Husband filed a motion for contempt against Wife for (1) allegedly removing certain items belonging to Husband from the marital residence; (2) failing to provide family photographs to Husband; (3) failing to pay costs related to the deed pertaining to the transfer of the marital residence; and (4) “intentionally fail[ing] to produce [sic] interrogatories” in accordance with the Tennessee Rules of Civil Procedure. He asserted that Wife’s intentional concealment of “assets, expenses, and income” caused him to incur additional and unnecessary expenses in obtaining the “hidden” records. Wife filed a counterclaim for contempt against Husband, arguing that he had failed to pay previously-ordered attorney’s fees in the amount of \$2,947.50. She also alleged that Husband was harassing her (1) with regard to a jointly-shared garbage receptacle located between Husband’s chiropractic office and the apartment building

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<sup>2</sup> The trial court stated the following:

In an independent action to set aside a judgment based upon fraud, the proof is limited to extrinsic fraud, Brown, supra, Whitaker v. Whirlpool, 32 S.W.3d 222 (2000). Examples of extrinsic fraud include:

Inducing the opposite party by false representations to him or his attorney to stay away from court, or keeping him in ignorance of the suit, or fraudulent conduct of counsel for the successful party whereby the opposite party is deceived, . . . Thomas v. Dockery, 232 S.W.2d 594 (1950).

Conversely, intrinsic fraud includes false or forged documents and *perjured testimony* as components of the internal chain composing the process of adjudication, the allegation, the evidence and the decree, Thomas, supra.

(Underlining in original; emphasis added).

awarded to Wife in the divorce, and (2) harassing her through the constant filing of motions and appeals which cost her thousands of dollars in attorney's fees.

The trial court subsequently held a hearing to address Husband's motion for relief pursuant to Rule 59 and the motions for contempt filed by the parties. It found that Husband had failed to show the existence of errors committed during the trial that would necessitate a new trial or an alteration or amendment of the November 30, 2004, judgment. With regard to the contempt motions, the trial court directed Wife to return certain items to Husband and to make available for copying any photographs requested by Husband. The cost of reproducing the photos was to be divided equally between the parties. The trial court directed Husband to supply Wife with all billing statements related to the transfer of title of "certain real property." The trial court stated that neither party had provided sufficient evidence to show a willful disobedience or violation of a court order. It further noted that each party was to bear their respective expenses for discovery, trial preparation, and attorney's fees in connection with the latest motions. An order incorporating these findings was entered on September 21, 2005. Husband appeals.

## II.

Stated in his language, Husband raises the following issues:

1. Whether the [t]rial [c]ourt abused its discretion where the preponderance of credible evidence presented concerning the financial status of [Husband] and [Wife] indicated a material change in circumstances sufficient to warrant relieving [Husband] of the burden of spousal support.
2. Whether the [t]rial [c]ourt abused its discretion in denying [Husband] his attorney fees and expenses related to discovery abuse by [Wife].
3. Whether the [t]rial [c]ourt abused its discretion in denying [Husband]'s Rule 60.02 Motion for Relief when [Wife] made intentional misrepresentations in her financial evidence, committed perjury in her testimony, and ambiguity of the divorce order creates an ambiguity where the [t]rial [c]ourt ordered equal division of debt, but allocated \$127,000.00 more to [Husband].

## III.

Our review of this non-jury case is *de novo* upon the record of the proceedings below with a presumption of correctness as to the trial court's factual findings, "unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). The trial court's resolution of issues of credibility is entitled to great weight on appeal. **Bowman v. Bowman**, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). We review the trial court's conclusions of law *de novo* with no presumption of correctness. **Brumit v. Brumit**, 948 S.W.2d 739, 740 (Tenn. Ct. App. 1997).

#### IV.

Husband first contends that the trial court erred by *not* finding that the preponderance of the evidence “indicated a material change in circumstances sufficient to warrant relieving [Husband] of the burden of spousal support.” We find no error.

Modification of spousal support is “factually driven and calls for a careful balancing of numerous factors.” *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001) (quoting *Cranford v. Cranford*, 772 S.W.2d 48, 50 (Tenn. Ct. App. 1989)). Consequently, the trial court is accorded wide discretion in modifying awards of spousal support, *id.*, and, therefore, “[a]ppellate courts are generally disinclined to second-guess a trial judge’s spousal support decision unless it is not supported by the evidence or is contrary to the public policies reflected in the applicable statutes.” *Id.* (quoting *Kinard v. Kinard*, 986 S.W.2d 220, 234 (Tenn. Ct. App. 1998)). Our role, therefore, is to determine whether the award demonstrates a proper application of the relevant legal principles and is not clearly unreasonable. *Id.* at 733. When the trial court has articulated its findings of fact, we will presume the correctness of those findings unless the evidence preponderates against them. *Id.* at 727; Tenn. R. App. P. 13(d).

When assessing the issue of modification of alimony awards, trial courts are directed to consider the factors contained in Tenn. Code Ann. § 36-5-121(i) (2005)<sup>3</sup> to the extent that those

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<sup>3</sup> Tenn. Code Ann. § 36-5-121(i) sets forth the following factors for the court’s consideration:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party’s earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

factors are implicated by the evidence. *Id.* at 730 (referencing Tenn. Code Ann. § 36-5-101(d), the predecessor of Tenn. Code Ann. § 36-5-121(i)). Although all relevant factors should be considered, the two most important factors are the financial needs of the party receiving the support and the ability of the obligor spouse to pay. *Id.* While the need of the spouse receiving the alimony is the most important factor when addressing an initial award of spousal support, the ability of the obligor to pay should be granted equal weight on decisions pertaining to the modification of spousal support. *Id.*

The trial court articulated the following findings in support of its decision to reduce Wife's spousal support award from \$800 per month to \$500 per month:

At the time of the divorce, [Wife]'s net monthly income was approximately \$594.00. Concomitantly, [Husband] enjoyed an annual, gross business and rental income in excess of \$100,000.00. The evidence preponderates in favor of a finding that, including spousal support, [Wife] currently enjoys a net annual income of approximately \$29,868.00. Following deductions for federal withholding taxes and professional dues, [Wife] enjoys net monthly income as an employee of the Greeneville City Board of Education of approximately \$820.00. According to [Wife]'s statement of income and expenses, her current monthly expenses exceed her net monthly income by approximately \$200.00.

The evidence also preponderates in favor of a finding that [Wife] financially assists the parties' son, John, by allowing him to conduct farm-related business upon her real property without charge. In addition, [Wife] periodically provides significant monetary gifts to her son to assist in his farming business.

Although [Husband] has made substantial efforts to increase his number of patient visits and to increase net business income from his chiropractic practice, following the divorce, [Husband] has experienced a reduction in annual business income. [Husband]'s reduction in business income has primarily resulted from increased competition in the area, decreased patient visits and reduced reimbursements from private insurance companies, as well as TennCare.

The changes in circumstances for both [Husband] and [Wife] have occurred since the original award. Such changes were not contemplated by the parties at the time of the divorce. Such material changes have been substantial as they have made significant impacts

upon both the recipient's need for spousal support and the obligor's ability to pay, see Kellum v. Kellum, 597 S.W.2d 907 (1980).

Considering the statutory factors elucidated at [Tenn. Code Ann. § 36-5-121(i)], this Court concludes that a modification of the original award of spousal support is justified. With the ability of the obligor to pay being given equal consideration to the need of the recipient, this Court determines that a material and substantial change in circumstances has occurred since the original award justifying a decrease in the amount of spousal support. This Court accordingly directs that effective retroactively to the date of the filing of [Husband]'s petition seeking a modification in the amount of spousal support, his spousal support obligation shall be \$500.00 per month. [Husband] shall receive credit for any spousal support paid since the filing of the respective petition in excess of this monthly amount.

(Underlining in original; internal footnotes omitted). Husband – as would be expected – does not take issue with the trial court's finding regarding his decreased income and ability to pay. However, he does challenge the trial court's finding that Wife's financial status still warrants an award of spousal support. In other words, Husband contends that the trial court abused its discretion when it decided not to reduce his support obligation to zero.

Husband attempts to counter any claim that Wife continued to need financial support by alleging that Wife perjured herself regarding her financial status and that the trial court relied upon Wife's "perjury and false evidence." Wife presented a statement of income and expenses reflecting that, over and above her alimony and other income, she had a monthly shortfall of approximately \$200. Husband presented the testimony and report of Joe Arwood, a certified public accountant, to contradict Wife's assertions. Mr. Arwood's report stated that the expenses listed in Wife's statement of income and expenses were substantially higher than the amounts actually expended based upon his examination of Wife's bank statements and cancelled checks. In this connection, it should be noted that Mr. Arwood did not interview Wife before giving his testimony. Husband also points to the fact that Wife's 2003 tax return did not reflect her receipt of any alimony for that year. Wife testified that the return should have evidenced her receipt of \$9,600 in alimony. Wife stated that the omission was not intentional.

Husband further argues that Wife's financial status is not as suggested by her statement of income and expenses. Husband notes that Wife had made a conscious decision not to pursue the receipt of the maximum rental income available to her. Mr. Arwood's report found that, on the average, Wife was collecting somewhere around \$11,381 per year in rental income from the apartment building awarded to her in the divorce. Mr. Arwood noted that the same rental property, when operated by Husband prior to the divorce, yielded an average of \$21,103.45 per year. Wife counters this by testifying that some of the apartment units were not rented because of maintenance issues. There was also testimony with respect to a rental house awarded to Wife in the divorce.



Husband testified that, prior to the divorce, he had received about \$200 per month in rental income from the house. Wife testified that she was unable to rent this house because Husband had removed its bathroom facility and heat supply. She further testified that its floor was rotten. Wife stated that “it would take some work to get it all put back together” and that she did not “see putting that much money into it to rent it.” Husband presented the testimony of Clyde Newton, a family friend who had done repair work on the parties’ properties during their marriage. Mr. Newton testified that, based upon his personal knowledge of the condition of the rental house, repairs would cost between \$1,500 and \$2,000. On cross examination, however, Mr. Newton stated that he had not seen the house since 1998 or 1999. Husband also argues that the trial court should have noted the adverse impact on Wife’s financial situation caused by her monetary gifts to their son.

The trial court found, and the evidence does not preponderate otherwise, that Wife continued to demonstrate a financial need for spousal support. The Chancellor was in a far better position than are we to evaluate the credibility of the witnesses. He observed the witnesses; saw their demeanor; observed how they testified; and generally was in a position to evaluate their overall credibility. Our review of the record in this case does not persuade us that the trial court abused its discretion in finding that the financial circumstances of Husband and Wife warranted a \$300 reduction in monthly alimony, but did not justify the complete elimination of spousal support.

## V.

Husband next argues that the trial court abused its discretion in denying him an award of attorney’s fees and expenses in connection with Wife’s alleged discovery abuse. In 2004, Husband filed two motions to compel discovery, requesting that the trial court enter an order to compel Wife to fully answer Husband’s interrogatories and request for production of documents. Both motions also requested the reimbursement of attorney’s fees incurred in connection with the motions. The trial court subsequently entered its order compelling Wife to provide Husband with information regarding how and where the requested documents could be obtained. The order further provided that Husband, upon receipt of this “source” material, was to subpoena the material needed by him. The trial court’s order did not address the issue of Husband’s attorney’s fees incurred in connection with the securing of the order to compel or additional attorney’s fees or expenses incurred by Husband as a result of the trial court’s directive in the order to compel.

One year later, Husband filed a motion for contempt in which he alleged that Wife had

intentionally failed to produce interrogatories in accord with the Tenn. R. Civ. P. which resulted in additional expense, in an attempt to hide assets, expenses, and income, and that [Husband] spent \$795.00 to the Greene County Bank for records hidden by [Wife], \$20.00 to Danny Wampler for records hidden by [Wife], and \$89.75 to Edward Jones, Inc., for records hidden by [Wife], and suffered additional unnecessary attorney fees and expenses.

The trial court found that

the parties shall bear their respective expenses of discovery and trial preparation, and the parties shall also bear their own attorney fees in connection with the motions [*i.e.*, Husband's Rule 59 motion seeking the total elimination of his spousal support obligation and both parties' contempt motions]. The Court finds that the current motions and petition of both parties have not been proved by a preponderance of the evidence an[d] as such the Court is without sufficient evidence to determine whether disobedience or violation of previous orders of this Court were willful.

In his brief to this Court, Husband asserts that the language of Tenn. R. Civ. P. 37.01(4)<sup>4</sup> required the trial court to award him reasonable attorney's fees and expenses incurred in connection with the securing of the order to compel discovery. However, the specifics of Husband's request belie his reliance upon Rule 37.04(4) for the simple reason that he is not really seeking attorney's fees and expenses in connection with the *securing* of the order to compel. Rather, Husband is seeking fees and expenses incurred by him *after* the order to compel was entered. Specifically, he contends that "[t]he evidence and findings of the court indicate that [he] was placed in a position of incurring additional legal fees, and spending in excess of \$800.00 for bank produced copies of checks due solely to [Wife]'s failure to comply with discovery procedures." Thus, Husband is actually seeking reimbursement of the fees and expenses he incurred as a result of the directives in the trial court's order to compel.

The subject order to compel discovery only directed Wife to disclose the *sources* of the requested documents to Husband. Since Wife had stated that she had produced all of the documents in her possession – testimony that the trial court apparently accredited – the court did not direct her to personally hand over the documents still being requested by Husband. It was Husband's obligation to secure the documents that he sought, and it was his responsibility to pay the costs of securing said documents. The trial court found, and the evidence does not preponderate otherwise, that Husband failed to present sufficient evidence of Wife's willful disobedience or violation of a court order. The trial court did not abuse its discretion in refusing to require Wife to reimburse Husband for attorney's fees and expenses that were solely his obligation.

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<sup>4</sup> Tenn. R. Civ. P. 37.01(4) provides as follows:

**Award of Expenses of Motion.** If the motion [for an order compelling discovery] is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

(Bold print in original).

## VI.

Husband also argues that the trial court abused its discretion in denying his Rule 60.02 motion. Tenn. R. Civ. P. 60.02 provides, in pertinent part, as follows:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or the misconduct of an adverse party; . . . or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken.

*Id.* Husband's motion requested relief from the judgment of divorce in light of newly-discovered evidence pertaining to "false, perjurious, and illegal conduct" of Wife. Specifically, Husband alleged that Wife perjured herself with respect to her involvement and knowledge of the \$127,000 loan from Husband's mother. At trial, Wife disputed the classification of the debt as a marital debt.<sup>5</sup> She testified that the loan was an estate planning tool utilized by Husband's mother and Husband. She stated that she was not involved in the transaction and did not benefit from the loan in any way. Thus, so Husband's argument goes, the trial court, relying on these "false" representations by Wife, incorrectly found that Husband should bear the full obligation of repaying the loan.

The trial court denied Husband's Rule 60.02 motion because it was filed more than one year after the judgment of divorce was entered. We agree that Husband's motion was filed too late. Under Rule 60.02, motions must "be made within a reasonable time." However, the rule provides that, if the motion seeks relief from a judgment based upon fraud, as Husband's clearly does, it must be filed "not more than one year after the judgment, order or proceeding was entered or taken." *Id.* The judgment, from which Husband seeks relief, was entered on February 17, 2000. Husband's Rule 60.02 motion was filed on February 13, 2002, almost two years after the entry of that judgment.

Husband contends that Wife waived the timeliness-of-filing issue by not raising it in her responsive pleading or at the motion hearing. This is simply not the case. The first affirmative defense listed in Wife's response to Husband's motion provides that Husband "is not entitled to relief under this 60.02 Motion due to the fact that these issues were not raised within one (1) year from the date that the proceeding became final."

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<sup>5</sup>We note, in passing, that debt incurred during a marriage is properly classified as marital debt. *Alford v. Alford*, 120 S.W.3d 810, 813 (Tenn. 2003) ("We now hold that 'marital debts' are all debts incurred by either or both spouses during the course of the marriage up to the date of the final divorce hearing.").

With respect to his Rule 60.02 motion, Husband further claims that the one-year filing period did not begin to run until July 20, 2001, *i.e.*, the date the Court of Appeals affirmed the trial court's judgment. In other words, Husband argues that the "final judgment" was not the date that the trial court entered its judgment of divorce but rather the date that the Court of Appeals affirmed the judgment. Husband's brief fails to cite authority for this assertion, and we are not aware of any. We acknowledge that this case was pending on appeal during the year following the entry of the trial court's earlier judgment, and that this meant that the "trial court [had] no jurisdiction to consider a Rule 60.02 motion during the pendency of [the] appeal." *Spence v. Allstate Ins. Co.*, 883 S.W.2d 586, 596 (Tenn. 1994). However, this does not affect the requirement that a motion based on fraud must be filed within one year of the judgment from which relief is sought. As the Supreme Court pointed out in *Spence*, a litigant desiring to file a Rule 60.02 motion during the pendency of an appeal, "should apply to the appellate court for an order of remand." *Id.* Unless the motion is frivolous on its face, the Supreme Court has directed that remand to the trial court for consideration of the motion "should be freely granted by the appellate court." *Id.*

Husband cites Rule 60.02(5) as an additional basis for the relief sought; however, he does not allege "any other reason justifying relief." Tenn. R. Civ. P. 60.02(5). He attempts to argue that the trial court's original order dividing the parties' marital property is somehow "confusing [with respect to] the math calculation," and that this ambiguity in the order forms a basis for relief under Rule 60.02(5).

While the language of subsection (5) of Rule 60.02 could be read to suggest a broad application of its terms, it has been "very narrowly" construed by the courts of this state. *Holiday v. Shoney's South, Inc.*, 42 S.W.3d 90, 94 (Tenn. Ct. App. 2000). Two applications of the rule have been recognized. One is limited to workers' compensation cases,<sup>6</sup> and the other is directed at those cases presenting "extraordinary circumstances or extreme hardship." *Gaines v. Gaines*, 599 S.W.2d 561, 564 (Tenn. Ct. App. 1980). The latter is not implicated by the facts of this case. Husband cannot claim fraud as a basis for relief and then seek to rely upon the provisions of subsection (5) of Rule 60.02 in order to circumvent the one-year-for-filing requirement for a Rule 60.02 challenge based upon fraud. As to Husband's ambiguity-in-the-order argument, we have considered it; however, we find no ambiguity in the trial court's order and, in any event, find no basis for relief under the well-established restrictive reading of subsection (5) of Rule 60.02.

## VII.

The judgment of the trial court is affirmed. This case is remanded to the trial court for enforcement of its judgment and collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, Leonard Lee Hartman.

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<sup>6</sup> See *Brown v. Consolidation Coal Co.*, 518 S.W.2d 234, 238 (Tenn. 1974).

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CHARLES D. SUSANO, JR., JUDGE